The Redundant Free Exercise?

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I. INTRODUCTION

Suppose the Free Exercise Clause were simply ripped out of the Constitution. What would change in contemporary constitutional law? [1] Justice Kennedy has written, "[t]he Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment . . . ."[2] The parallels may be so close that the lines actually coincide. The reasons for the near-identity of the protection afforded by the Free Exercise Clause and that afforded by other constitutional provisions are founded in two doctrinal developments.[3] First, although the Free Exercise Clause could be, and

* Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center. I would like to thank Kevin Quinn, S.J., for his assistance in locating material on Roman Catholic moral teaching, Andrew Koppleman, Eugene Volokh, and participants at a Faculty Research Workshop at Georgetown University Law Center for helpful comments. I regret that personal considerations made it impossible for me to attend, and therefore to profit from the discussions at, the Loyola University Chicago School of Law Conference on Law and Religion for which this Article was prepared.

1. I put the question this way so that I can concede the importance of the Free Exercise Clause in the history of free expression law. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995). "[I]n Anglo-American history, . . . government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Id.* at 760. I am interested not in what the Free Exercise Clause has contributed to the development of civil liberty, but what the contemporary Free Exercise Clause adds to our civil liberties.

2. Lee v. Weisman, 505 U.S. 577, 591 (1992).

3. A note on the nature of my enterprise seems appropriate. In what follows, I offer what I believe to be the most natural readings of the relevant cases. I acknowledge that there are other plausible readings, some of which would provide distinctive protection to religious liberty through the Free Exercise Clause. *See, e.g., infra* note 82 and accompanying text (describing a more aggressive reading of the protection afforded by the Free Exercise Clause when state laws are not "generally applicable"); *see also* Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 3 (2000) (noting that exceptions articulated in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), "if generously interpreted, could prove to be a substantial exception" to the case's central holding). My sense is that those who offer these alternative case readings do so because they disagree with the cases' natural reading and believe that the Free Exercise Clause ought to give religious liberty more protection than the Supreme Court appears to believe it should.

has been, interpreted differently in the past, today the Clause protects only against statutes that target religious practice for regulation. Under the notorious peyote case, *Employment Division, Department of Human Resources v. Smith*,[4] the Clause does not require states to accommodate their neutral statutes of general applicability to religious practices.[5] The present scope of the Free Exercise Clause, that is, is quite small.[6]

Second, other constitutional doctrines protect a wide range of actions in which religious believers engage. Much religious activity is speech, pure and simple, and therefore protected by the Free Speech Clause. The free speech doctrine includes a non-discrimination requirement, which the Supreme Court has invoked with respect to religious speech.[7] Many regulations singling out religious speech for adverse treatment fall under the non-discrimination requirement. Further, much religious activity, while not conducted in words, may fairly be described as symbolic speech, triggering free speech protection. In addition, some aspects of religious practice not covered by free speech principles might be protected by a constitutional right of intimate association. Finally, a newly emerging doctrine defining a right of expressive association could provide substantial protection for the internal activities of religious organizations, where those activities are in some sense constitutive of the religious community itself.[8] Thus, the protection afforded the exercise of religion by clauses other than the Free Exercise Clause is relatively large.[9]

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4. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).

5. *See infra* note 29 and accompanying text (discussing the neutrality and generality requirements of enforceable laws).

6. Of course my argument would fail if the Clause's scope expanded, for example by a judicial repudiation of the peyote case.

7. Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) (holding that a university regulation prohibiting the use of funds for student religious organizations was a form of viewpoint discrimination, violating the First Amendment).

8. *See infra* Part III (arguing that the Free Speech Clause in combination with the Free Exercise Clause would protect religious practice left unprotected after the peyote case).

9. Steven Gey has recently argued that governments may invoke the Establishment Clause to justify restrictions on religious expression that would not be allowed were the government invoking its general police powers to restrict non-religious expression. Steven G. Gey, *When Is Religious Speech Not "Free Speech"?*, 2000 U. ILL. L. REV. 379, 400 (2000). I do not address Gey's argument in this Article because my concern is with what might be called the *coverage* of religious expression—whether it would have special constitutional weight absent the Free Exercise Clause—and not with the question of the circumstances in which limitations on such expression might be justified. In my terms, the title of Professor Gey's article is a bit misleading because the article does not address the question of "When is religious speech not 'free speech'?," but rather the question, "When is religious speech permissibly subject to regulation in circumstances where secular speech would not be subject to regulation?."

Together these observations suggest my conclusion: Contemporary constitutional doctrine may render the Free Exercise Clause redundant.[10]

II. RELIGIOUS EXPRESSION AS SPEECH

According to the Supreme Court, "private religious speech . . . is as fully protected under the Free Speech Clause as secular private expression."[11] We must, of course, have in hand an analysis of free speech law before we can analyze the extent to which religious activities are "fully protected under the Free Speech Clause." Today there are two available structures for free speech analysis.[12] These two structures sometimes yield different results, and make sense of sets of Supreme Court decisions that differ slightly. As I will argue, they do

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10. According to some approaches to constitutional interpretation, that conclusion is a reason to reject contemporary constitutional doctrine. Such approaches insist that every constitutional provision have some independent meaning. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 588 (1995) (Thomas, J., concurring). In *Lopez*, Justice Thomas argues against the view that Congress has the power to regulate activities that affect interstate commerce because if it did,

> many of Congress' other enumerated powers under Art. I, § 8, [would be] wholly superfluous. After all, if Congress may regulate all matters that substantially affect commerce, there is no need for the Constitution to specify that Congress may enact bankruptcy laws, cl. 4, or coin money and fix the standard of weights and measures, cl. 5, or punish counterfeiters of United States coin and securities, cl. 6. Likewise, Congress would not need the separate authority to establish post offices and post roads, cl. 7, or to grant patents and copyrights, cl. 8, or to "punish Piracies and Felonies committed on the high Seas," cl. 10.

Id.

Frederick Mark Gedicks defends a position similar to the one developed here. Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, GEO. WASH. L. REV. (forthcoming 2001). Professor Gedicks argues that free speech and related doctrines should be developed in ways that acknowledge the presence of a religious interest. This, Professor Gedicks argues, would avoid making the Free Exercise Clause redundant. I am not sure that it would. Professor Gedicks argues, for example, that religious expression should be treated as a form of high-value speech, but I doubt that doing so requires that we treat the fact that speech is religious as something that *changes* the application of standards for determining when speech is high-value. For a discussion of the question of whether religious speech is high-value speech, see *infra* notes 32-35 and accompanying text.

11. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995).

12. In this Article, I do not address the distinctive problem of government speech. In my view, questions about government speech present problems with respect to the government's general police powers and with respect to the Establishment Clause. I do not think that, on careful analysis, questions about the permissibility of speech by government officials in their official capacity are fruitfully addressed in free exercise terms. *See* Gey, *supra* note 9, at 392 (concluding that non-policy making public employees "receive some free speech protection for their purely private religious expression" but only up to the point that their expression is not logically "attributable to the government").

not differ substantially with respect to those religious activities that can fairly be characterized as speech or symbolic speech.[13]

A. Direct Regulation of Religious Activities as Free Speech

The easier model to describe divides all expressive activities into two categories, one category receiving full protection and the other receiving no protection. By *full* protection, I mean that state efforts to regulate the activity must satisfy a high standard.[14] By *no* protection, I mean, as a preliminary statement, that rational state efforts to regulate will be permitted. *Chaplinsky v. New Hampshire*[15] provides a convenient statement of this model:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . . .[16]

Expression "inside" the scope of the First Amendment is fully protected; expression "outside" it is not. What about religious expression?

Governments can regulate expression directly or indirectly. Direct regulation consists of rules prohibiting the expression. Indirect regulation raises the costs of expression in some other way, for example, by denying the expression some benefit, like access to public space available to other forms of expression. The peyote case used these terms to describe direct regulation: A direct regulation "requires (or forbids) the performance of an act that [a person's] religious belief forbids (or requires)."[17] Direct regulation is impermissible if the act in question is belief or the profession of belief, for both are forms of speech, pure and simple. Coerced speech cases such as *Wooley v. Maynard*[18] make obvious this point.

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13. I do not purport to deal comprehensively in this Article with all problems of religious exercise. My defense is that I do cover a great deal of the relevant territory. The scope of a distinctive free exercise protection would be small even if, as I doubt, such distinctive protection were needed for *every* problem I fail to discuss.

14. Depending on the context, this standard might be described as strict scrutiny or as the clear and present danger test or some variant adapted to the particular problem at hand. I do not believe that anything significant turns on the standard's precise formulation.

15. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

16. *Id.* at 571-72 (citations omitted).

17. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 878 (1990).

18. Wooley v. Maynard, 430 U.S. 705, 714-17 (1977) (holding that a state may not require an individual to disseminate an ideology by requiring the individual to display the state motto on private property).

But, as the peyote case emphasized, religious exercises involve not only words but "the performance of (or abstention from) physical acts. . . ."[19] Some of those acts, however, may fairly be characterized as symbolic speech. As a general matter, an expressive activity is symbolic speech when it is intended to communicate and when, as a matter of social reality, it is generally understood by some relevant audience as a communication. Many forms of ritual activity are symbolic speech. So, for example, a class studying the Bible is engaged in pure speech, while a congregation receiving communion is engaged in symbolic speech.[20] The act of communion is intended as a communication by the congregants to each other and, more importantly, to their God,[21] and non-congregants in our society generally understand the act of communion as a communication of some sort.

Unfortunately, the general status of symbolic speech in the inside-outside model is confused. I suspect that most commentators believe that an expressive activity intended and understood as a communication should be given full protection. If so, ritual activities fitting that description would be fully protected.[22] The Supreme Court's position is somewhat more complex. An expressive activity characterized as symbolic speech can be directly regulated if the state's justification for the regulation is "unrelated to the suppression of free expression. . . ."[23] That is, direct regulation is permissible when the government has some reason, independent of the act's expressive content, to regulate. Commentators take issue with the Court's approach because it seems unlikely that the government would enact or enforce a direct regulation of an activity intended and understood as a communication unless it were concerned with the communicative content of the activity.

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19. *Smith*, 494 U.S. at 877.

20. The example is adapted from *Widmar v. Vincent*, 454 U.S. 263, 286 (1981) (White, J., dissenting).

21. I acknowledge the awkwardness of the fit between this description and the congregation's deepest understanding of what is occurring; to say that an act of communion is intended to communicate to God is, in some ways, to demean the act. In addition, some sorts of religious observance are not understood by the religion's adherents as communication at all. This is particularly true of some Native American religions. For a discussion of some Native American religious observances with no communicative function, see David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769 (1991). And, from a different direction, perhaps the Constitution's identification of religion as a matter of special concern, in the Free Exercise Clause, makes it easier for the law to appreciate that rituals directed at a worshiper's god should be understood as speech protected by the Free Speech Clause.

22. *See infra* notes 25-26 and accompanying text (discussing some complications that arise when a ritual activity is intended as a communication but not understood as such).

23. United States v. O'Brien, 391 U.S. 367, 377 (1968).

The Court's development of the inside-outside model confirms this insight. Suppose an expressive activity, whether a religious ritual or otherwise, lies outside the scope of the Free Speech Clause. It is somewhat misleading to say that the activity receives no protection at all; the government's regulation must still be rational. But, the Court has said, there is an additional requirement where the regulated activity is expressive. The government may not discriminate against particular viewpoints expressed in acts, including speech, that are outside the coverage of the First Amendment in the inside-outside model.[24]

Similar results occur with respect to religious rituals to the extent they can be described as symbolic speech. The Court in the peyote case made this point while invoking what it described as the residual protection afforded by the Free Exercise Clause: A state could not prohibit particular physical acts "only when they are engaged in for religious reasons, or only because of the religious belief that they display."[25] The Court applied this rule in finding unconstitutional a city's ban on the ritual slaughter of animals performed as part of Santería religious worship.[26] The Free Speech Clause's ban on viewpoint discrimination produces the same result.[27] Much religious ritual would thus be protected as speech, whether pure or symbolic, because governments are unlikely to enforce regulations against religious activities intended and understood as communications for reasons other than the activities' communicative content.

Some activities motivated by religious belief, including certain religious rituals, may not be fairly described as symbolic speech. This may be because the activities, while motivated by religious belief and intended to communicate that belief (whether to God, to other congregants, or to the wider community), are not generally understood to be communications. Ordinarily this occurs when the activity's communicative message is ambiguous to those not already cognizant of the intended message. The peyote case may be an example: Those outside the religious community may believe that the non-religious benefits of the use of a psychoactive drug are large enough to induce

24. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (holding that although "fighting words" are generally not protected under the First Amendment, a state may not impose content-based prohibitions on some "fighting words").

25. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 877 (1990).

26. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

27. Of course, a club that slaughtered animals simply for the pleasure of it would be unable to invoke the Free Speech Clause. But an anti-vegetarian club that slaughtered animals to express its members views could do so, and could invoke the ban on viewpoint discrimination were the state to ban only the club's acts of animal slaughter.

people to engage in the ritual activity because they want to obtain the non-religious benefits.[28] Similarly, religiously motivated provision of sanctuary to refugees may be understood as a political rather than a religious act, and religiously motivated objections to autopsies may seem simply irrational.

Other religiously motivated actions are not even plausibly described as symbolic speech. Here, the best examples are cases involving the application of local zoning ordinances or historic preservation rules to church structures. Perhaps a religion requires that a church be located somewhere in a neighborhood. The claim that the congregation's religious beliefs require that the church not provide parking spaces commensurate with local zoning requirements is implausible. The refusal to provide sufficient parking spaces is unlikely to be intended as a communication, and it is certainly unlikely to be understood as a communication.

Religiously motivated actions that cannot be described as symbolic speech can be regulated if the government has a valid reason, unless the reason arises from the religious content of the action. The same is true if the religiously motivated action *is* fairly characterized as symbolic speech and one accepts the Supreme Court's approach to the analysis of symbolic speech. Enforceable laws that directly regulate religious activities, whether speech activities or other religiously motivated activities, *are* neutral laws of general applicability. Their neutrality follows from the requirement that, even outside the Free Speech Clause's coverage, governments may not discriminate on the basis of viewpoint. Their generality follows from the requirement that the government have some reason other than the suppression of free expression to justify direct regulation of expressive activities.[29] In short, the Free Speech Clause provides at least as much protection to

28. *Cf.* United States v. Lee, 455 U.S. 252 (1982) (rejecting the claim that a religious believer can refuse to pay Social Security taxes for his employees). In *Lee*, Justice Stevens noted that non-members of the religious community may believe that the financial benefits of the asserted religious belief swamp the religious ones. *Id.* at 264 n.3 (Stevens, J., concurring).

29. One can read the requirement of general applicability to provide somewhat greater protection for religious liberty. Consider a statute that regulates some activity but contains some exemptions, whether expressly or in its administration by granting decision-makers the discretion to exempt particular individuals or groups from the regulation. The statute would not target religious activity in a discriminatory way if the exemptions were provided only to non-religious activities, but were denied to some non-religious activities as well as to religious ones. My view is that this interpretation of the "general applicability" standard, while legally tenable, is one of those aggressive readings motivated by discomfort with the basic rule laid down by the peyote case.

religious activities as the current incarnation of the Free Exercise Clause does.

I can now introduce the second model of free expression law. While the inside-outside model sharply distinguishes between activities that fall within the protection of the Free Speech Clause and those that fall outside it,[30] the alternative model is more like an onion, with different layers in which different types of speech receive differing degrees of protection. This model emerged as the Court became uncomfortable with what it considered the rigidities associated with full protection of speech inside the scope of the First Amendment under the inside-outside model. The Court initially treated all commercial speech as outside the First Amendment's scope,[31] but later found that some commercial speech deserved some degree of protection.[32] The Court retained a lurking sense that not all commercial speech deserved the same high degree of protection afforded political speech, and began protecting commercial speech at a level between fully protected and unprotected speech.[33] A similar development occurred with respect to sexually explicit but non-obscene speech. Some of its forms seemed to the Court to be deserving of some protection, but certainly not the protection given core political speech.[34] The Court thus moved toward a model in which protection came in layers: High-value speech was fully protected, intermediate-value speech (commercial speech) somewhat less so, low-value speech (sexually explicit non-obscene

30. This creates large problems in the administration of free speech law, because the characterization of a particular activity becomes crucial. A non-libelous statement is entitled to full protection, a libelous one to none; a sexually explicit but non-obscene photograph is entitled to full protection, an obscene one to none. A similar characterization problem can arise with respect to religious activities, when the activity may be widely, but not universally, understood as a communication. An example may be the wearing of religious head-gear. Goldman v. Weinberger, 475 U.S. 503 (1986). The Court's solution to the problem in the free speech area has been to insist on clear statutory definitions of the matter sought to be regulated, typically through the use of the overbreadth doctrine. As far as I know, no similar development has occurred in the free exercise area. Perhaps a reconceptualization of free exercise as free speech might have the benefit of producing sustained attention to the problems of overbreadth associated with religious activities. There is a glimpse of the problem in Justice Blackmun's dissent in the peyote case, which noted that consumption of peyote is not as attractive as outsiders might think. *Smith*, 494 U.S. at 914 n.7 (Blackmun, J., dissenting). Free exercise law before the peyote case incorporated a balancing test, which is inimical to robust development of overbreadth concepts. Once the problems migrate to the free speech context, perhaps the overbreadth problems can be directly confronted.

31. *See* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

32. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

33. *See id.*

34. *See* Young v. Am. Mini Theatres, Inc., 427 U.S. 50 (1976).

speech) even less so, and really low-value speech almost entirely unprotected.[35] At each layer, state regulatory interests increase in importance. Thus, an interest insufficient to justify regulation of high-value speech may justify the regulation of intermediate-value speech.

This onion model creates what have been called *subject-matter* classifications of speech, distinguished from *content-based* and *viewpoint-based* classifications.[36] The degree of scrutiny a regulation receives depends on the subject-matter regulated. The key question for this Article then becomes: Which layer includes religious expression? I believe the Court has not addressed this question largely because the Free Exercise Clause provided an alternative source of protection before the peyote case. My intuition, though, is that religious speech would be given the protection afforded speech either in the highest-value category or in the intermediate-value category.

Some of the reasons that political speech has high-value also apply to religious speech as well. For example, governments have historically targeted religious speech for suppression just as they have targeted dissident political speech. Additionally, religious speech is, for many, at least as central to their self-definition as political speech. Yet, some of the reasons that political speech has high-value apply much less strongly to religious speech. In particular, religious speech does not serve as a direct check on the political power of rulers in the way that political speech does.[37] The differences between political speech and religious speech suggest that the Free Exercise Clause may provide a reason independent of free speech theory for treating religious speech as possessing high-value in the free speech doctrinal framework.

My intuition is that religious speech ought to receive at least as much protection as commercial speech. The implications of that intuition lie largely beyond this Article's scope. Clearly, the conclusions drawn in the analysis of direct regulation under the inside-outside model would remain valid were religious speech treated as high-value speech. The analysis of intermediate-value speech differs only to the extent that state

35. This model may itself be undergoing some development, as the Court has increased the protection given commercial speech, perhaps to the point where it receives full protection. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (holding that a state may not entirely ban the advertisement of liquor prices consistent with the First Amendment).

36. *See* Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 81-83 (1978) (arguing that speech restrictions based on "subject-matter" comprise a distinct classification of restrictions for the purposes of First Amendment analysis).

37. Religious speech may contribute indirectly to checking government power by helping constitute important civil society institutions.

regulatory interests can more frequently outweigh the free speech interest when intermediate-value speech is involved.[38]

B. Indirect Regulation of Religious Expression as Speech

Indirect regulation occurs when the government allows people to engage in an activity their religion requires, but raises the cost of doing so relative to the costs incurred by people engaged in similar, but non-religious, activities. The core examples here are cases involving the availability of public resources—whether money or space—to support activities that some people are motivated to engage in for religious reasons and that others are motivated to engage in for secular reasons. Some people want to communicate their political views in a public park, with an eye to persuading others to agree with them; others want to communicate their religious views in the same place, with the same goal. Some people want to provide food and shelter to the needy and homeless based on secular accounts of justice; others want to do so because of their religious beliefs. Some people want to provide education outside the public schools because they believe that public schools are ineffective; others want to do so because they believe that public schools improperly exclude religion. The government indirectly regulates religious activities when it makes the park available to the political proselytizer, but not the religious one, when it provides funds for the secular soup kitchen, but not the religious one, and when it creates a voucher program in which vouchers can be used only at private schools not affiliated with religious institutions. When does the Free Speech Clause prohibit indirect regulation of religious expression in these ways?

Indirect regulation of religious expression takes two forms. First, the government may single out religious expression for exclusion from access to the public resource at issue. Alternatively, religious expression may fall within a larger category of activities that are denied access to the resource.[39] According to the Supreme Court, singling out religious *expression* for indirect regulation requires quite strong justifications because it amounts to discrimination on the basis of

38. Those interests vary so greatly, and the balancing that occurs when such variations are introduced can be so complex, that I find it unhelpful to attempt even to sketch the possible outcomes were religious speech treated as intermediate-value speech.

39. In the latter situation, the regulation may simply have an adverse impact on specific religious activities, or it may have a disparate impact on such activities when individuals with religious motivations are more likely than others to engage in the activities falling within the category.

viewpoint.[40] As in the case of direct regulation, much religious activity can be described as expressive when indirect regulation is involved.[41]

The conclusion that religious speakers cannot be excluded from access to public resources devoted to speaking seems straightforward enough. The reason supporting that conclusion is important. Typically the government's asserted justifications for excluding religious speakers range from a desire not to support religion even indirectly, to a concern that the government might be violating the Establishment Clause by making public resources available to religious speakers, or, more loosely, to a concern that the government should not do something conveying the appearance of support for religion or for specific religions. That is, the justification for excluding religious speakers from access to the public resource at issue typically *relates* to the religious content of what the speakers have to say. However, as we have seen, direct regulation of expressive activities is permitted only if the government's reason for regulation is *un*related to the expressive content of the regulated activities. The rule barring a categorical exclusion of religious expression from access to public resources parallels the rule against direct regulation of expressive activities.

Consider next the exclusion, not of religious expression, but of some activities motivated by religious belief from access to public resources. Some systems of public assistance to the needy make it impossible to provide such services in religious settings, that is, in settings where the service-providers make clear *their* religious commitments.[42] What are the justifications for excluding such providers from the program? Some of the justifications mirror those listed above; they are justifications related to the religious content of what is available—the religious symbols and statements that those who receive assistance cannot avoid—and where the service is to be provided. To that extent, I

40. *See* Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 819, 835 (1995) (holding that a university regulation prohibiting use of university funds to support student religious organizations was a form of viewpoint discrimination in violation of the First Amendment).

41. *See supra* notes 19-23 and accompanying text (discussing when symbolic speech is an expressive activity).

42. Obviously, exclusion would be constitutional if inclusion violated the Establishment Clause. The Free Speech Clause cannot require what the Establishment Clause prohibits. The scope of the Establishment Clause is, of course, an enormous topic in itself. All that needs to be said here, I think, is that the presence of a free exercise interest in addition to, or instead of, a free speech interest, cannot change the conclusion that one constitutional provision cannot require what another prohibits. I qualify this point below. *See infra* notes 87-89 and accompanying text (arguing that some legislative accommodations to religion may be acceptable because of the Free Exercise Clause but would, perhaps, be unacceptable under the Establishment Clause alone).

believe, the exclusion of religiously motivated providers from access to the programs is questionable.

Another set of justifications is based on the free speech interests of the recipients of the provided service. Recall that coerced expression, religious or not, is banned by the Free Speech Clause.[43] The general concern with providing certain religious organizations engaged in public assistance with access to public resources, is that recipients of the assistance will be coerced into participating in religious exercises. The coercion might be blatant, as when a service provider requires a recipient to attend a religious ceremony as a condition of receiving the service, or it might be subtle, as when religious symbolism suffuses the location in a way that makes it seem natural for the recipient to move from the soup kitchen to the sanctuary. Under current understandings of the Free Speech Clause, exclusion of religious activities from access to public resources for these reasons would probably be constitutional, either because the justifications for exclusion should be described as unrelated to suppression of expression or, more plausibly in my view, because the free speech interests of recipients outweigh the free speech interests of the service providers.[44]

One might think that the Free Exercise Clause added something here to the constitutional protection of religious expression and activity. I have described the problem of potential coercion as one in which free speech interests are pitted against other free speech interests. Where the free speech interest on one side of the balance is an interest in *religious* speech, a Free Exercise Clause independent of the Free Speech Clause might add weight to that side. Unfortunately, as the coerced speech cases show, there appears to be a free exercise interest on both sides of the balance. The recipient's interest in avoiding coerced speech is also an interest in religious speech, because the free exercise principle protects the liberty of non-believers and believers equally.

The final problem to be addressed is indirect regulation in the form of laws that have an adverse or disparate impact on religious activity. Modern free speech law gives slight protection against such indirect regulations. The exemplary case is *Clark v. Community for Creative Non-Violence*.[45] In *Clark*, the Court upheld the application of a general

43. *See supra* note 18 and accompanying text (discussing one such coerced speech case).

44. Alternatively, perhaps at least some systems in which the government puts private parties in a position to coerce others, blatantly or subtly, into religious expression would violate the Establishment Clause. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (holding that a school district's policy allowing student-led prayer at football games violated the Establishment Clause).

45. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984).

rule against camping in national parks to prohibit advocates for the homeless from erecting a "tent city." The tent city would have made the point that national policy had deprived the tent city's residents of affordable shelter.[46] Applying the regulation to the tent city clearly adversely affected the advocates' ability to express their point of view. This case shows that mere adverse effect on expression does not invalidate otherwise permissible regulations. Nor, as the peyote case shows, does mere adverse effect on religious activity trump permissible regulations.[47]

Older cases, which the Court appears to regard as good law, suggest that the Free Speech Clause prohibits some regulations that adversely affect speech.[48] In some of these cases, the Court appears concerned that applying an apparently neutral regulation will have a disparate—not merely an adverse—impact on some identifiable class. To use the clearest example, prohibiting everyone from using a city's parks or streets for demonstrations will have a more serious impact on the relatively poor than on the relatively well-to-do. The latter can rent space for a rally, or buy time on television to disseminate their message; the former cannot. I find the contours of the disparate impact doctrine quite unclear.[49] To the extent such a doctrine exists, it should be adaptable so that a free speech disparate impact doctrine would apply to regulations that have a disparate impact on religious expression.[50]

C. Conclusion

The Free Speech Clause, as currently interpreted, provides protection for almost all of what the Free Exercise Clause, as currently interpreted, does. There are some areas where the overlap is incomplete, where the Free Exercise Clause provides distinctive protection even after the

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46. *Id.* at 299.

47. *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).

48. *See, e.g.*, Martin v. City of Struthers, 319 U.S. 141 (1943) (holding that an ordinance prohibiting individuals from knocking on doors to distribute literature violated the First Amendment); Schneider v. State, 308 U.S. 147 (1939) (striking down as violative of the First Amendment an ordinance prohibiting distribution of literature on public streets).

49. Gedicks, *supra* note 10, (arguing that existing free speech doctrine provides rather robust protection when speech is incidentally burdened by facially neutral regulations). I think that Gedicks gives more weight to some of the Court's verbal formulations than is appropriate in light of the way in which the Court has applied its tests. In my view, existing doctrine provides relatively little protection when non-religious speech is incidentally burdened, and would provide the same relatively low level of protection to religious expression.

50. I am not sure that there are any good examples of such regulations, or, if there are any, whether they are at all significant. If they are rare or unimportant, my basic point would stand: The Free Exercise Clause adds little of importance to what is available under the Free Speech Clause.

peyote case. Those areas are, however, rather small. Little would be lost if the Free Exercise Clause, as currently interpreted, were dropped from the Constitution. As I argue next, some of what might be lost could be picked up again under the emerging doctrine protecting a right of expressive association.

III. RELIGIOUS PRACTICES AND THE RIGHT OF EXPRESSIVE ASSOCIATION

A. Introduction: Defending the Ministerial Exemption

A state directive that a church employ someone in a ministerial capacity who lacks what the church regards as an essential qualification for the job would seem to be a quintessential violation of the Free Exercise Clause. Yet, the possibility that the state could do so without violating the Clause opened up after the peyote case.[51] Many state laws ban discrimination on the basis of gender and marital status. Some denominations have religious tenets according to which only men, or married people, can serve as ministers. As far as I am aware, no state's anti-discrimination law has been interpreted to proscribe those employment practices, with legislatures creating exemptions for churches or courts construing the anti-discrimination statutes as not reaching the practices in question.[52] The peyote case, however, suggests that states *could* apply their anti-discrimination laws to the employment practices of churches without violating the Free Exercise Clause because such laws seem to be neutral laws of general applicability.[53] However, the Free Exercise Clause is not the only constitutional provision available to churches defending their employment practices.

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51. *See Smith*, 494 U.S. at 872.

52. In the federal context, Title VII exempts "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a) (1994). Also, "it shall not be an unlawful employment practice for a school, college, or other educational institution . . . to hire and employ employees of a particular religion if . . . the curriculum of such school, college, university, or other educational institution . . . is directed toward the propagation of a particular religion." *Id.* § 2000e-2(e)(2). Title VII also exempts hirings, dismissals, or classifications based on religion where "religion . . . is a bona fide occupational qualification reasonably necessary to the natural operation of that particular business or enterprise." *Id.* § 2000e-2(e)(1).

53. *See* Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. DET. MERCY L. REV. 189, 376-77 (1999) (asserting that "[i]t is questionable" whether the constitutional requirement of a ministerial exemption survives the peyote case); *see also Smith*, 494 U.S. at 872.

A series of cases culminating in *Boy Scouts of America v. Dale*[54] recognizes a constitutionally protected right of expressive association.[55] *Dale* clarified the contours of that right. First, the right protects associations that "engage in some form of expression, whether it be public or private."[56] The Boy Scouts qualified under this standard because the organization sought "to transmit . . . a system of values."[57] Second, the courts must "defer[] to an association's assertions regarding the nature of its expression."[58] That is, the values an association seeks to transmit simply *are* what the association asserts them to be. Courts should not examine the values, or the views expressed, to determine whether they are "internally inconsistent" or otherwise problematic, as long as they are sincerely held.[59] Third, the right of expressive association is impaired if the government's requirement "affects in a significant way the group's ability to advocate public or private viewpoints."[60] Finally, just as the courts must defer to an association's statements about its own views, they must also defer "to an association's view of what would impair its expression."[61] In particular, some entities entitled to the protection of the right of expressive association are protected against "[t]he forced inclusion of an unwanted person" because such inclusion would "force the association to send a message . . . to the world" that is inconsistent with the organization's own message.[62]

The precise scope of the right of expressive association remains to be determined. At a minimum, it provides a constitutional basis, other than the Free Exercise Clause, for exempting church employees from the coverage of state anti-discrimination laws. Churches plainly engage in public and private expression, and seek to transmit a set of values. A church that claims its message would be impaired by complying with non-discrimination laws is claiming, for example, that the inclusion of

54. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

55. *See* New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1 (1988); Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987); Roberts v. United States Jaycees, 468 U.S. 609 (1984).

56. *Dale*, 530 U.S. at 648.

57. *Id.* at 650.

58. *Id.* at 653.

59. *Id.* at 651.

60. *Id.* at 648.

61. *Id.* at 653. Assertions to that effect appear to be insufficient standing alone; apparently the courts must be satisfied that the association's claim of impairment is at least reasonable in some minimal sense.

62. *Id.* at 648, 653.

women in the ministry would send a message to the world inconsistent with the church's own values.

The ministerial exemption is easy to sustain under the right of expressive association. So are somewhat broader applications of church-based employment exemptions. Michael McConnell suggests that a limited reading of the right of expressive association might not provide full protection to church-related employment decisions: "A church or synagogue [should] not need to demonstrate that employment of any particular person would be inconsistent with its expressive purpose; the law respects the fundamental autonomy of religion with respect to all employment in a religious capacity."[63] *Dale*'s emphasis on judicial deference to an institution's characterization of its expressive activities means that churches would not have to demonstrate inconsistency, but merely assert it, to obtain the protection McConnell thinks desirable. More interesting and difficult cases arise from two components of the Supreme Court's doctrine. One is the test for determining whether an entity *has* a right of expressive association; the other is the test for determining when such an entity is forced to send a message incompatible with its own.

B. Identifying Entities Covered by the Right of Expressive Association

As the Court stated in *Dale*, to be covered by the right of expressive association, the entity "must engage in *some form of expression*, whether it be public or private."[64] Consider an ordinary commercial enterprise owned by a group of devoutly religious friends, who place expressions of their religious beliefs throughout their place of business.[65] One can readily imagine a charge that the pervasiveness of those expressions constitutes harassment of employees on the basis of religion,[66] or that the displays discriminate against potential customers

63. McConnell, *supra* note 3, at 20.

64. *Dale*, 530 U.S. at 648 (emphasis added).

65. I use the example of a business owned by a group of people for expository purposes, to avoid being distracted by questions that might arise were the business to be owned by a single person, whose right of *association* might be thought not to be implicated in regulations limiting the display of religious materials in the business-place. I believe that an individual owner does have a right of expressive association, for reasons I discuss below, see *infra* notes 71-81 and accompanying text, but think it better to discuss the coverage of commercial entities before I discuss the coverage of intimate ones.

66. For examples, see Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627, 630-33 (1997). Such examples of harassment include an employer placing religious articles in the employee newsletter and Christian-themed verses on the paychecks; another employer allowed daily broadcasting of prayers over the public address system. *Id.*

who adhere to other religions or to no religion at all. Would the owners be protected by the right of expressive association against such charges?

It is tempting to think that the right of expressive association extends only to entities organized for the purpose of expression, or perhaps more broadly to entities that engage primarily in expression. That would be sufficient to cover churches as institutions,[67] but would leave religious believers acting through other types of organizations unprotected. *Dale* shows, however, that entities entitled to claim the protection of the right of expressive association need not devote themselves entirely to expression or even to the transmission of values. The Boy Scouts engage in many activities other than expression or the transmission of values, including some commercial activities. As the Court said, "associations do not have to associate for the 'purpose' of disseminating a certain message" to be protected by the right of expressive association.[68] Richard Epstein has pointed out that nearly every commercial entity has a "corporate culture" that serves as the entity's expression of its basic commitments.[69] As Epstein puts it, "every organization engages in expressive activity when it projects itself to its own members and to the rest of the world."[70] Under that analysis, *Dale* might provide constitutional protection to all associations.

Extending the right of expressive association to ordinary commercial enterprises owned and operated by people with deeply held beliefs, religious or political, might be quite troubling. The owner of Ollie's Barbeque may have had political or moral objections to serving African-Americans in the restaurant he owned.[71] Lester Maddox, who became governor of Georgia, came to public attention when he vehemently objected to "associating" with African-Americans by

67. David E. Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 MO. L. REV. 83 (2001). The article concludes that *Dale* would protect religious schools that discharge "employees who become pregnant out of wedlock if sex outside of marriage is frowned upon by the sponsoring church," and that "[c]hurches that teach that mothers should stay at home with young children may . . . refuse to employ women with young children." *Id.* at 130-31. I wonder whether a religious school that predicates its action on concern for "sex outside of marriage" could thereby justify discharging only unmarried pregnant women, and not men who engage in non-marital sexual relations. Of course, the school could reformulate its religiously based concern so as to deal only with "sex outside of marriage by women," and under *Dale* that reformulation would receive deference.

68. *Dale*, 530 U.S. at 655.

69. Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 139-40 (2000).

70. *Id.* at 140.

71. *See* Katzenbach v. McClung, 379 U.S. 294 (1964) (rejecting claim based upon the Commerce Clause that the 1964 Civil Rights Act could not be applied to Ollie's Barbeque).

providing them with service at his restaurant.[72] Thus, the right of expressive association might threaten the enforcement of anti-discrimination laws where purely commercial entities owned by people with strong convictions claim to be entitled to the right's protection.

The Court's language in *Dale*—"must engage in some form of expression"—tends to support a broad application of the right of expressive association. The very act of discriminating, one might say, *is* expression sufficient to bring the right of expressive association into play.[73] Alternatively, one might analogize the association forced by anti-discrimination laws to coerced expression in the free speech context. Perhaps, at best, it can be said that a line must be drawn somewhere, noting only that size, the amount of expression relative to the amount of commercial activity, and the degree to which an entity is under the personal supervision of individuals who espouse particular views will affect the line-drawing exercise. That is, the larger and more fully commercial the enterprise, the less likely a successful right of expressive association claim will be.[74]

If large commercial enterprises pose one problem for efforts to define the coverage of the right of expressive association, extremely small enterprises pose another. Here, the model is the individual landlord renting a room, or the half of a duplex in which he or she does not reside, to tenants. The landlord may have religious objections to cohabitation by non-married people, and want to refuse to rent the room to a cohabiting couple. Enforcing an ordinance prohibiting discrimination on the basis of marital status might indeed force

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72. Ian Ayres, *Alternative Grounds: Epstein's Discrimination Analysis in Other Market Settings*, 31 SAN DIEGO L. REV. 67, 72 (1994) (citing Maddox's obituary to support the assertion that "Lester Maddox gained national publicity shortly after passage of the 1964 Civil Rights Act when he distributed ax handles to supporters in order to prevent blacks from patronizing his Atlanta restaurant, the Pickrick").

73. Analogous arguments have been made in connection with claims that these expressions are protected by the Free Speech clause directly. The literature is extensive. *See, e.g.*, Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399 (1996); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992). I suspect that supplementing the free speech arguments with an argument drawing upon the right of expressive association will not change anyone's position on where the line should be drawn.

74. Bernstein, *supra* note 67, at 215-17. Bernstein relies on the fact that Justice Sandra Day O'Connor voted with the majority in *Dale* and previously stated that the right of expressive association extended only to associations that were primarily expressive to support his conclusion that the right extends only to non-profit associations. *Id.* at 127. According to Bernstein, "[i]t is difficult to see how a for-profit entity would successfully argue that it exists primarily for expressive purposes." *Id.* I note that this limitation seems in some tension with *Dale*'s apparently broader formulation.

something reasonably called association on the unwilling landlord. Yet, as Herbert Wechsler notoriously pointed out, the government forces association on unwilling people all the time.[75] The landlord's case may differ from the general case of forced association for two reasons. First, the setting seems more intimate, more directly tied to the landlord's definition of his or her own identity, than in the general case of forced association through anti-discrimination laws.[76] The landlord, that is, may be able to assert a right to intimate association as the basis for finding unconstitutional this particular type of "forced association." Second, society may be more willing to accept as sincere those claims based on the idea that association in relatively small-scale interactions would send a message to the world inconsistent with the messages the objector wishes to send. In this way the claim of forced association takes on a specific expressive component. My intuition is that a landlord, physically present near the leased premises, should be able to claim protection under the right of expressive association.

C. Identifying Impermissibly Coerced Messages

The second problem with the right of expressive association that deserves attention, is the Court's conclusion in *Dale* that the right is violated when a statute has the effect of requiring an entity covered by the right of expressive association to "send a message to the world" inconsistent with the entity's own beliefs.[77] In *Dale*, enforcing the state's anti-discrimination laws would not require the Boy Scouts actually to send a literal message. Rather, as the Court put it, "Dale's presence" sends the message.[78] Action, not words, sends the message that conflicts with the Boy Scouts' own message.

A wide range of actions might send a message that violates the right of expressive association. Consider the idea of *scandal* as it occurs in

75. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (stating "the freedom of association is denied by segregation" and arguing that the same freedom is denied by desegregation as well).

76. The jurisdictional limitation in federal anti-discrimination law, which extends the scope of coverage only to non-intimate settings, seems to confirm my sense that society recognizes a difference between intimate and non-intimate settings. Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (1994) (defining an employer as one "who has fifteen or more employees"); Fair Housing Act, 42 U.S.C. § 3603(b)(2) (1994) (exempting from the Fair Housing Act of 1968 multifamily dwellings of fewer than four units, if the owner resides in one of them). Of course, this jurisdictional limitation is simply statutory, and I am claiming that the Constitution requires some sort of jurisdictional limitation, at least when claims against forced association rest on concerns about expression, whether religious or political.

77. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

78. *Id.* at 653.

Roman Catholic moral teaching. According to one definition, an action may constitute a scandal when it leads someone else to sin or to think less of the teaching of the Church.[79] The idea of scandal is simple: non-Catholics will think less of the church when they observe a Catholic, or a church-related institution, engaged in actions that appear inconsistent with what the observers believe to be Catholic doctrine, because the observers will think the actions hypocritical. An example of the problem would be whether a doctor who performs elective sterilizations in her private medical practice should be given hospital privileges at a hospital operated under the control of the Catholic Church.

The concept of scandal plays a role in the complex body of Catholic moral teaching dealing with cooperation with evil. In that teaching, the possibility of scandal is one element that should be taken into account when a Catholic, or a church-related institution, contemplates a particular action; it is rarely dispositive. That, however, is simply a characteristic of the specific teachings of the Catholic Church. Individuals or entities protected by the right of expressive association certainly could take a broader view of scandal than does Catholic moral teaching.[80] The previously discussed landlord, for example, might have personal views according to which it would be scandalous for people to know that he or she had rented the duplex to a cohabiting couple. A person or entity covered by the right of expressive association might claim that complying with some government directive would be scandalous in the relevant sense; it would lead others to think less of that person or entity's commitment to its religious beliefs. Notably, the point of scandal is that scandalous acts interfere with the message the person or entity is attempting to communicate. Additionally, *Dale* holds that the courts must defer to the claimant's own characterization of its religious beliefs, which, I would think, would have to include beliefs about what constitutes a scandal. Through this route, a person or entity might be able to establish the claim that complying with government regulations would violate the right of expressive association.[81]

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79. BENEDICT M. ASHLEY, O.P., & KEVIN D. O'ROURKE, O.P., HEALTH CARE ETHICS: A THEOLOGICAL ANALYSIS 195 (4th ed. 1997).

80. *See* Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829 (1989) (holding that the Free Exercise Clause protects a person with sincere religious beliefs even though the person was not a member of an established religious sect or church).

81. The Court's opinion in *Dale* suggests that courts might review the claim of scandal to see if the claimant sincerely believed that scandal would result from compliance. *See Dale*, 530 U.S. at 646-47. Historically the courts have been reluctant to find that a belief assertedly held by a claimant is held insincerely, and I suspect that this would be true in the context of the right of expressive association as well.

D. Conclusion

In *Dale*, for the first time, the Supreme Court found that a state law violated the right of expressive association. From the majority's point of view, the case may have been a particularly strong one for enforcing that right. However, it is important to note that four justices dissented. Therefore, one should be cautious in developing robust and far-reaching doctrines on the basis of *Dale* and its analytic structure. Perhaps, though, one should take the Court at its word. *Dale*, as doctrine, could support the development of constitutional prohibitions on a substantial range of state regulatory efforts that might not fall directly under the protection of the Free Speech Clause. If so, the independent contribution of the Free Exercise Clause to religious liberty would be further reduced.

IV. THE RESIDUAL EFFECTS OF THE FREE EXERCISE CLAUSE

The Free Exercise Clause has some residual content after *Smith*, the peyote case. First, state laws are immunized from free exercise scrutiny only if they are neutral laws of general applicability. As the Santería case shows, laws that single out religious practices for adverse treatment are subject to careful constitutional examination.[82] Yet, nearly every such law would be subject to the same degree of careful examination under the Free Speech Clause. As we have seen, a great deal of religious activity is either speech in its pristine form or can fairly be characterized as expressive conduct. When the state singles out such speech or expressive conduct for regulation, it engages in viewpoint discrimination. After all, singling out some activity for differential treatment is just another way for the government to discriminate against that activity. The residual Free Exercise Clause might protect against laws singling out religious activities that could not fairly be characterized as expressive conduct, but I am confident that the number of instances in which such protection is needed is quite small. The activities that irritate people so much that they press their representatives to regulate only these activities and not other similar activities are quite likely to be religious speech or expressive conduct.

The more interesting residual component of the Free Exercise Clause is the protection it affords to what have come to be called hybrid claims, that is, claims in which a free exercise claim that would be insufficient standing alone to trigger close examination of the challenged government conduct is joined with some other constitutionally rooted

82. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

claim that would be insufficient standing alone to do so as well.[83] It has never been made clear how we should understand the protection given hybrid claims. A panel of the Court of Appeals for the Ninth Circuit offered an extensive, and to my mind exceedingly generous, analysis of the hybrid-claim issue in a now-vacated decision.[84] The case involved a challenge to the enforcement of a local ordinance barring discrimination by landlords against potential tenants on the basis of their non-marital status. The landlord had religious objections to non-marital cohabitation, and refused to rent an apartment to an unmarried couple who were, in the landlord's view, more than mere roommates.

According to the panel, close examination was justified when the claimant presented non-frivolous arguments that the activity sought to be regulated was protected by some constitutional provision other than the Free Exercise Clause, joined with a substantial argument that the regulation had a disparate adverse impact on those with particular religious beliefs.[85] This formulation would approximate the restoration of the Free Exercise Clause to its pre-*Smith* scope, in light of the ready availability of non-frivolous arguments supporting an enormous range of asserted constitutional claims. More important, it seems quite likely that, under today's law, the landlord has not just a non-frivolous constitutional claim, but a good one, that insisting that he refrain from discriminating against unmarried tenants would violate his right of expressive association.[86]

The Free Exercise Clause might have a final and perhaps unexpected residual effect. Consider permissible accommodations of religion, that

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83. I do not discuss the other qualification the *Smith* Court placed on its formulation of free exercise doctrine, that one could still make valid free exercise claims in contexts where the state already had in place a mechanism for making individualized determinations relevant to the free exercise claims. *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 880-81 (1990). I know of no decisions relying on this qualification, which in any event seems quite unjustified on the facts of *Smith* and, as far as I can tell, every other free exercise case the Court has decided. As the Court analyzed *Smith*, the question for decision was whether the state had to adjust its criminal laws against drug use to accommodate those who used peyote in religious ceremonies. *Id.* at 874. The criminal enforcement setting, however, is full of opportunities for individualized determinations, both informal, as prosecutors make decisions about which cases to pursue, and formal, when juries could be asked whether a particular defendant presented a claim for accommodation that ought to be honored. If the qualification would be applicable to *Smith* itself, it is hard to see what content it could have. *See also* McConnell, *supra* note 3, at 3 (noting that "few statutes are generally applicable across the board, without exceptions and without consideration of individual cases").

84. Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692 (9th Cir. 1999), *withdrawn for reh'g*, 192 F.3d 1208 (9th Cir. 1999), *vacated en banc*, 220 F.3d 1134 (9th Cir. 2000).

85. *Id.*

86. *See supra* Part III.B (discussing the scope of the right of expressive association).

is, statutes in which the legislature itself adjusts the scope of its regulatory programs by exempting some potential subjects of regulation by explicit reference to some religious feature of their activity or composition. These accommodations have been challenged under the Establishment Clause.[87] What justifications for such accommodations might a legislature offer, in the absence of a Free Exercise Clause? Without the Free Exercise Clause, the legislature's action would have to be justified by some aspect of its general police power. That is, its explanation for its refusal to extend regulatory power to the full scope suggested by the statutory definitions absent the accommodation would have to refer to its general authority to legislate in the public interest, including the public interest in treating religious believers decently.[88] But the general police power cannot be a sufficient justification against an otherwise cogent anti-establishment challenge, because *every* law is justified by the general police power. To allow the police power to justify what would otherwise be violations of the anti-establishment principle would be to deprive that principle of any content. The Free Exercise Clause, however, might operate as a narrow justification for legislative accommodations of religion.[89]

The residual Free Exercise Clause, then, may still be inextricably linked to the Establishment Clause, not because, as in the conventional view, both clauses protect religious liberty, but because the Free Exercise Clause is necessary to defeat Establishment Clause challenges to a certain class of statutes.

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87. Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (holding that the application of a statutory exemption to a religious organization's secular activities did not violate the Establishment Clause; noting that sufficient room exists under the Clause for benevolent neutrality allowing religious exercise to exist without sponsorship and without interference).

88. In a non-religious context, a government may adjust the scope of its programs without serious constitutional limitation. A program regulating agricultural production, for example, may exempt peanut farmers. The exemption would be permissible if rationally supported by some police power rationale. Calling the exemption an accommodation to peanut farmers brings out the parallel to religious accommodations, and demonstrates the large extent to which police power rationales can support accommodations.

89. Accommodating religious belief might be *more* problematic than other exemptions from regulatory programs. Religious accommodations discriminate in favor of a certain type of belief, and therefore against other types. Ordinarily such discrimination would have to survive a high degree of review. *See, e.g.*, Police Dep't of Chi. v. Mosley, 408 U.S. 92 (1972) (holding that the city ordinance violated the Equal Protection Clause by making an impermissible distinction in permitting peaceful labor picketing and banning other peaceful picketing). The Free Exercise Clause might lower the standard for justifying religiously based accommodations in the face of an objection based on the equality component of the free speech doctrine. (I admit to being a bit uncomfortable with this assertion, because I have a sense that it attempts to make the Free Exercise Clause do too much work across disparate constitutional provisions.)

V. CONCLUSION

The Supreme Court's peyote decision has been widely decried as substantially reducing the constitutional protection afforded religious belief and practice.[90] Such criticisms overlook the possibility that practices previously protected by the Free Exercise Clause can still be protected under other constitutional doctrines.[91] The free speech doctrine and the newly defined right of expressive association go a long way to providing an adequate substitute for the Free Exercise Clause. What may be lost, however, is a sense that religious discourse is somehow importantly different from non-religious discourse about politics, morals, and the rest of human activity. Whether we ought to regret the diminution of that sense in constitutional law is, of course, another question.

90. *See* Battaglia, *supra* note 53, at 376; Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990).

91. I should note as well that the actual protection distinctively afforded by the Free Exercise Clause was always smaller than the Clause's most vigorous proponents asserted. For a discussion, see Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 BYU L. REV. 117.